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No. 89-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION, ENVIRONMENTAL ACTION AND CONSUMER FEDERATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 13(b) of the Public Utility Holding Company Act ("PUHCA"), which prohibits a subsidiary of a public utility holding company from selling goods to an associated utility at a price exceeding the seller's "cost," bars the Federal Energy Regulatory Commission ("FERC") from finding the utility's electric rates to be "unjust" or "unreasonable" under Sections 205 and 206 of the Federal Power Act ("FPA")," where

   a. the utility voluntarily purchases high-priced coal from its subsidiary when less expensive coal is available from unaffiliated companies;

   b. FPA Section 318 provides that if the same "person" is subject both to a requirement under PUHCA, and to a requirement under the FPA with respect to the same subject matter, the PUHCA requirement applies to such person and the FPA requirement does not;

   c. PUHCA Section 13(b) applies to the coal subsidiary while FPA Sections 205 and 206 apply to the utility subsidiary; and

   d. both statutes expressly treat the coal subsidiary, the utility subsidiary and the holding company as distinct "persons."

2. Whether FERC's order created "trapped costs," as defined by *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), where

   a. In *Nantahala* and *Mississippi*, costs were "trapped" because two agencies having jurisdiction over the same utility issued conflicting orders, the first agency directing the utility to buy its affiliate's electricity and the second agency

deeming the utility free to buy electricity elsewhere; while

b. in this case, the first agency has jurisdiction over the coal seller, the second agency has jurisdiction over the utility buyer, and the utility buys the coal voluntarily.

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INTEREST OF AMERICAN PUBLIC POWER ASSOCIATION, ENVIRONMENTAL ACTION AND CONSUMER FEDERATION OF AMERICA

American Public Power Association ("APPA") is a national service organization representing more than 1,750 local, publicly owned electric utilities in 48 states, Puerto Rico, the Virgin Islands, American Samoa and Guam. Local publicly owned utilities serve approximately 14% of all U.S. consumers. Environmental Action ("EA"), founded in 1971, is a non-profit research, educational and advocacy organization headquartered in Washington, D.C. On behalf of its national membership, EA advocates responsible environmental and energy policies. Consumer Federation of America ("CFA"), founded in 1968, is the nation's largest consumer advocacy organization. It is composed of over 250 state and

local affiliates, representing senior citizen, low-income, labor, farm, public power and cooperative organizations.*

APPA, EA and CFA (hereinafter, *Amici*) represent customers of electric utilities. Many APPA members buy at wholesale from utility subsidiaries of holding companies whose corporate structures are regulated by the Securities and Exchange Commission ("SEC") under the Public Utility Holding Company Act, 15 U.S.C. § 79 *et seq.* ("PUHCA"). Sales at wholesale are subject to "just and reasonable" rate regulation under the Federal Power Act ("FPA"), 16 U.S.C. § 792 *et seq.* Members of EA and CFA are retail customers. While retail rates are set nominally by state public service commissions, these commissions frequently must include in retail rates the FERC-mandated costs of a utility's wholesale power purchases. *See Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

All retail customers, and many wholesale customers, lack purchasing alternatives because their utility suppliers control exclusive service territories. In the absence of competition, these customers depend on regulation to assure that utilities operate with all the efficiencies a competitive market would demand.

Congress enacted the FPA to provide that assurance. FPA Section 205, 16 U.S.C. § 824d, requires that utility rates be "just and reasonable." Congress has equated the "just and reasonable" rate with the "'true' market price." *Federal Power Commission v. Texaco*, 417 U.S. 380, 398-99 (1974) (*quoting Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9, 25 (1968)). The "true" market price is, in turn, "the price that would result through the mechanism of a truly competitive market. . . ." *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984). It follows that rate regulators like FERC must apply market pressures. *Democratic Central Comm. of D.C. v. WMATC*, 485 F.2d 886, 907 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).[1]

* The parties have consented to the filing of this brief. Copies of their letters have been lodged with the Clerk.

Faced with FERC scrutiny, an independent utility must shop the market for the lowest-price goods and services. Under the Court of Appeals' decision, however, the utility subsidiary of a holding company can disregard the market and buy from its affiliate. Provided the affiliated seller's price does not exceed its "cost," as defined by the SEC under PUHCA, FERC must treat the utility's purchase as "just and reasonable," no matter how inflated the cost is relative to market. If utility subsidiaries may use corporate form to escape market accountability, consumers will suffer from high prices and production inefficiencies.[2]

The lower court's reasoning threatens millions of electric consumers. There are nine utility holding company systems currently subject to PUHCA's interaffiliate transaction rules. Pet. Jur. Br. at 17. Utility subsidiaries of these systems serve, directly or indirectly, about 49 million households in 30 states and the District of Columbia. That number represents a starting point only. Mergers and acquisitions in the electric industry may

[1] *See also Midwestern Gas Transmission Co.*, 36 F.P.C. 61, 79 (1966) (while "[m]anagements of unregulated businesses . . . have no alternative to efficiency," utility management "does not have quite the same incentive;" therefore, regulatory scrutiny must ensure that all costs are "necessary and prudent"), *aff'd sub nom., Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir.), *cert. denied*, 392 U.S. 928 (1968).

[2] *Cf. Public Service Co. of New Mexico*, 17 F.E.R.C. ¶ 61,123 at p. 61,246 (1981) ("industries that operate with the assurance that their prices will recover costs plus a reasonable return are less innovative and efficient than those whose prices are subject to a competitive market"), *aff'd sub nom., Public Service Co. of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

expand existing holding companies and create new ones.[3] As independent single-state utilities become affiliates of multistate holding companies, they too can conduct internal transactions free of FERC (market) scrutiny.

The goods and services involved can cover the full range of inputs to electricity production. Many PUHCA-regulated holding companies already have created special "service" subsidiaries to sell numerous goods and services, *e.g.*, power supply planning, legal services, land ownership and accounting, to utilities who formerly performed such functions themselves. Responsibility for power plant operations—historically a utility's most significant function—may move to nonutility subsidiaries as well.[4] When the nonutility subsidiary sells these goods and services to the utility at "cost," rate regulation under the FPA would consist of routine passthroughs to consumers, unchecked by market forces.

STATEMENT OF THE CASE

In a series of orders beginning in 1971, the SEC authorized the formation of Southern Ohio Coal Company ("SOCCO"), a subsidiary of the nation's largest public utility holding company, American Electric Power Co.

[3] *See, e.g., Southern California Edison Co.*, 47 F.E.R.C. ¶ 61,196 (1989) (setting for hearing proposed acquisition by Southern California Edison Co. of San Diego Gas & Electric Co.); *Northeast Utilities Service Co.*, 50 F.E.R.C. ¶ 61,266 (1990) (setting for hearing proposed acquisition by Northeast Utilities of Public Service Co. of New Hampshire); *Environmental Action, et al. v. SEC*, 895 F.2d 1255 (9th Cir. 1990) (affirming SEC decision approving holding company's acquisition of new utility subsidiary to serve wholesale customers in Western states), *petition for rehearing pending* (filed Feb. 23, 1990).

[4] *See, e.g., Entergy Operations, Inc.*, SEC Admin. Proc. No. 70-7879 (application filed Sept. 25, 1989) (proposal to create subsidiary to perform nuclear operation and management services for three utility affiliates); *Northeast Utilities Service Co.*, SEC Admin. Proc. 70-7695 (application filed Jan. 11, 1990) (proposing, *inter alia*, creation of special subsidiary to operate Seabrook plant owned by utility affiliate).

("AEP"). SOCCO would mine coal and sell it to utility subsidiaries of AEP, including Ohio Power Company ("OPCO"). The SEC orders stated, *inter alia*, "[t]hat the charges for coal by [SOCCO] will be based on an amount equal to the actual cost of [SOCCO] in developing the reserve and mining such coal." *Ohio Power Co.*, SEC Release No. 17,383 at 2 (Dec. 2, 1971). OPCO purchased coal from SOCCO and used the coal to generate electricity for sale at wholesale and retail.

In 1982, FERC initiated a rate proceeding under the FPA to review the wholesale rates OPCO charged its municipal customers in Ohio. FERC found that OPCO's wholesale electric rates were not "just and reasonable," as required by FPA Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, because OPCO had paid SOCCO a coal price exceeding market alternatives. FERC disallowed from OPCO's rates any SOCCO coal purchase costs exceeding "the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098 (1987) (*quoting Public Service Co. of New Mexico*, 17 F.E.R.C. ¶ 61,123 (1981), *aff'd sub nom., Public Service Co. of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987)).

The Court of Appeals for the District of Columbia vacated FERC's decision. *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989). The lower court found that although OPCO was subject to FPA Section 205, OPCO also "plainly is . . . subject to [PUHCA] section 13(b) [15 U.S.C. sec. 79m(b)] with respect to its contractual relations with SOCCO." The court concluded that under FPA Section 318, 16 U.S.C. § 825q, concerning "Conflicts of Jurisdiction," "it is for the SEC rather than FERC to determine the inter-associate price." 880 F.2d at 1408. The Ohio municipal customers, Arcadia *et al.*, then sought review in this Court.

SUMMARY OF ARGUMENT

The Court of Appeals misread Section 318. Section 318 states, unambiguously, that FERC review is precluded under the Federal Power Act only when a single "person" is subject to a requirement under both PUHCA and the FPA with respect to the same subject matter. FPA Section 205 applies to OPCO, while PUHCA Section 13(b) applies to SOCCO. Because OPCO and SOCCO are different persons under both the FPA and PUHCA, there is no "person" subject to provisions of both statutes. Section 318 does not apply to this case.

The Court of Appeals reopened a regulatory gap Congress closed 55 years ago. The Public Utility Act of 1935 created a dual scheme of regulation. Title I of the Act, PUHCA, relates to corporate form: it directs the SEC to guard against holding company structures which enable utilities to inflate costs or evade rate regulation. Title II of the Act, the FPA, relates to operations: it directs FERC to ensure that utilities operate with all reasonable economies. Under these statutes, the regulatory result does not depend on corporate form.

In the OPCO-SOCCO relationship, the SEC is to police corporate structure by setting maximum prices for non-utility sales. The FERC is to police operations by inducing the utility to shop for the lowest priced goods and services. There is no need for Section 318 because there is no "conflict of jurisdiction."

The lower court also erred in applying the "trapped cost" analysis of *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). In *Nantahala* and *Mississippi*, the "trapping" took place because one agency (FERC) ordered a utility to take a certain action; then another agency (a state commission) set the utility's rates as if the utility had taken an entirely different action. The facts here are fundamentally different. No agency directed, or had the authority to direct, OPCO to buy coal from SOCCO.

ARGUMENT

I. SECTION 318 DOES NOT APPLY BECAUSE NO SINGLE "PERSON" IS SUBJECT TO A REQUIREMENT OF BOTH STATUTES

A. Introduction

Section 318 provides (emphasis added):

> If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, *any person* is subject both to a requirement of [PUHCA] . . . and to a requirement of [FPA] . . . , the requirement of [PUHCA] shall apply to *such person*, and *such person* shall not be subject to the requirement of [FPA] . . . , with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of [PUHCA], in which case the requirements of [the FPA] shall apply to such person.

Section 318 is unambiguous. FERC review under the Federal Power Act is ousted only when a single "person" is subject to a requirement under both statutes. As explained in Part I.B, *infra*, FPA Section 205 applies to OPCO, while PUHCA Section 13(b) (15 U.S.C. § 79m(b)) applies to SOCCO. Because OPCO and SOCCO are different persons under both the FPA and PUHCA, there is no "person" subject to provisions of both statutes. Section 318 does not apply to this case.

Part I.C explains that this commonsense reading of Section 318 not only heeds Congress' words; it also produces the result Congress intended: dual, not duplicative, regulation. Part I.D contends that by disregarding Congress' language, the Court of Appeals weakened the very regulatory tools Congress meant to strengthen.

B. Section 205 of FPA Applies to OPCO While Section 13(b) of PUHCA Applies to SOCCO; and OPCO and SOCCO are not the Same "Person"

The Court treated OPCO and SOCCO as the same "person" for purposes of Section 318, and then concluded that this "person" was subject to a requirement of both PUHCA and FPA with respect to the same "subject matter." Without explanation, the Court ignored express statutory language which makes OPCO and SOCCO separate "persons."

OPCO: FPA Section 205(a) provides that "[a]ll rates and charges made . . . by any *public utility* . . . shall be just and reasonable (emphasis added). FPA Section 201(e), 16 U.S.C. § 824(e), defines a "public utility" as "any *person* who owns or operates facilities subject to the jurisdiction of the [FERC]." Here, that "public utility" ("person") is OPCO.

SOCCO: PUHCA Section 13(b) provides that

> it shall be unlawful for any subsidiary *company* of any registered holding company . . . to enter into or take any step in the performance of any . . . sales . . . contract by which such company undertakes to . . . sell goods to[] any associate company thereof except in accordance with such terms and conditions . . . as the Commission . . . shall prescribe.

(emphasis added). Section 13(b), by its explicit terms, applies only to one "subsidiary company": the seller. Here, that seller is SOCCO.

It is clear from the face of the statute that SOCCO is subject to PUHCA but not the FPA; while OPCO is subject to the FPA but not PUHCA. The only remaining question, in determining whether Section 318 applies, is whether SOCCO and OPCO are separate "persons."

Under PUHCA Section 2(a)(1), 15 U.S.C. § 79b(a)(1), a "person" means an "individual or a company." The FPA contains virtually the same definition. *See* 16 U.S.C. § 796(4) ("person" means "an individual or a corporation"). A "person" is not two individuals or two companies. A "person" is one individual or one company. SOCCO is a company, and OPCO is a separate company. SOCCO and OPCO cannot be the same "person."

The Court of Appeals ignored this entire issue. The Court of Appeals interpreted Section 318 as if it read as follows:

> Where two associate companies are parties to a transaction, and one company is subject to a requirement of the Federal Power Act while the other company is subject to a requirement of PUHCA with respect to the same subject matter, the requirement of PUHCA shall apply and the requirement of the Federal Power Act shall not.

That is not what Section 318 says. Section 318, as Congress wrote it, applies only when *a single person* is subject to both statutes. Because no single person in this case is subject to both statutes, the Court of Appeals' decision must be reversed.

Respondent may assert that even if OPCO and SOCCO are not the same "person" for the purposes of Section 318, the missing "person" is AEP, the holding company. That argument has no statutory basis. A holding *company* is a distinct "person" in the same legal sense that its subsidiary company is. (Under PUHCA Section 2(a)(1), a "person" is an "individual or a *company*.") As a "person," the holding company is legally distinct from each of its subsidiaries.

Both statutes expressly confirm the distinction between holding company and subsidiary. PUHCA Section 2(a)(7)(A), 15 U.S.C. § 79b(a)(7)(A), distinguishes the holding company from its public utility subsidiary: a "holding company" means "any company which directly or indirectly owns . . . 10 per centum or more of the outstanding voting securities of a public-utility com-

pany. . . .").[5] The FPA makes the same distinction. In *Central Illinois Public Service Company*, 42 F.E.R.C. ¶ 61,073 (1988), CIPS, a utility, sought to create a new holding company ("HC") to acquire all of CIPS' stock. CIPS argued that Section 318 precluded FERC review because HC's acquisition of CIPS's stock was subject to Sections 9 and 10 of PUHCA. (Absent Section 318, FERC would review this "disposition of . . . jurisdictional facilities" under Section 203 of the FPA. *See Central Vermont Public Service Company*, 39 F.E.R.C. ¶ 61,295 (1987)). FERC disagreed:

> [W]hile section 318 would deprive [FERC] of jurisdiction if a "person" is also subject to SEC regulation with respect to the same subject matter, here different persons are involved. CIPS and the holding company it wishes to create are two separate corporate entities, and each is regulated by a different agency. [FERC] has jurisdiction over CIPS, the operating utility, and with respect to this transaction CIPS is not subject to SEC regulation under PUHCA.

42 F.E.R.C. at p. 61,328.[6]

The holding company is distinct not only from its utility subsidiaries, but also from its nonutility subsidiaries. PUHCA Section 13 makes this plain. Section 13 distinguishes different types of interaffiliate transactions based on which persons are involved. Section 13(a) flatly prohibits a "registered holding company" from performing services for or selling goods to a public utility company or "mutual service company" which is a member of the same holding company system. But the prohibition against holding-company-as-seller does not apply to subsidiary-company-as-seller: under Section 13(b), a

[5] *See also* PUHCA Section 2(a)(8) (distinguishing "subsidiary" from "holding company").

[6] *Accord, Savannah Electric and Power Co.*, 42 F.E.R.C. ¶ 61,240 at p. 61,779 (1988).

"subsidiary company" may provide goods and services to associate companies, subject to SEC rules. If Congress had viewed the holding company as indistinct from its subsidiaries, Section 13 would not vary the interaffiliate transaction rules depending on which persons were transacting.

The Court of Appeals rejected the FERC's jurisdictional analysis in part because, in the Court's view, "there could never be a conflict between the SEC and FERC with respect to a subject matter not specifically enumerated in section 318." 880 F.2d at 1406. If one heeds Congress' "person" language, that criticism evaporates. Suppose OPCO produced its own coal and sold its excess to another utility subsidiary of AEP. PUHCA Section 13(b) would apply to OPCO, since a "subsidiary of [a] registered holding company" would be selling goods to an "associate company thereof." Under Section 13(b), the SEC could limit OPCO's sales price to "cost." But what if OPCO's wholesale electric customers then persuade FERC that OPCO was operating inefficiently by selling its coal at a price below market value? Absent Section 318, FERC could (1) deem OPCO to have charged its associate a higher price for coal, and then (2) lower OPCO's wholesale electric rates to reflect the higher hypothetical revenues OPCO would have received from the properly priced coal sale. But Section 318 would bar FERC from acting; otherwise OPCO, a single "person," would be subject to a requirement under both statutes with respect to the same subject matter. Under the "person" analysis, Section 318 retains its purpose.

C. Adherence to Congress' Language Produces What Congress Intended: Dual, not Duplicative, Regulation

The Public Utility Act of 1935 subjected holding companies like AEP to dual regulation. The Act "had two primary purposes: to curb abusive practices of public utility companies by bringing them under effective con-

trol, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973).[7] Title I (PUHCA) prevents abusive corporate structures, while Title II (FPA) ensures just and reasonable operations. This structural-operational distinction has been confirmed by the Courts. *See City of Lafayette v. SEC*, 454 F.2d 941, 955 (D.C. Cir. 1971) ("SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations"), *aff'd, Gulf States, supra.*

Congress enacted a distinct structural review in part to preserve and strengthen traditional operational review. As PUHCA's Senate sponsor declared:

> The very essence of a common-sense scheme of public regulation is, therefore, that the corporations to be regulated should not be permitted to reach a size and power and a complication where a Federal regulatory body cannot be a match for them. . . . [PUHCA] is an attempt to whittle down the size and power and complication of these giant corporations until the Federal and State commission can be a match for them.

79 Cong. Rec. 9043 (1935) (Sen. Wheeler) (June 11).

Properly interpreted, Section 318 should subtract nothing from Congress' dual regulatory scheme. The legislative history confirms that Section 318 prevents duplication, not duality. During the PUHCA debate, Rep. Wadsworth offered an amendment to transfer PUHCA responsibility from the SEC to the FPC. After learning of the existence of Section 318, he withdrew his amendment, explaining:

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[7] *See also* S. Rep. No. 621, 74th Cong., 1st Sess. at 17 (1935) (FPA "seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by" PUHCA).

> Mr. Chairman, when I offered this amendment on Saturday afternoon I did so having in mind obviating the very serious and extensive duplication of effort and expense, both to the Government and to the persons to be supervised, if this jurisdiction over the utilities field should be divided between the Securities and Exchange Commission and the Federal Power Commission. It was the purpose of my amendment to center the jurisdiction in one commission in order to avoid such duplication.
>
> I find, however, Mr. Chairman, that at the very end of the bill, on page 292, provision is made for the avoidance of conflicts in jurisdiction, and in reading that section I have reached the conclusion that a large measure of duplication and overlapping can be, and will be, avoided. It was my failure to recall or to notice that at the last moment this section was added to the bill that accounts for my offering the amendment.

79 Cong. Rec. 10507 (1935). Rep. Wadsworth withdrew his amendment, after noting that "[S]ection 318 in large measure meets my objection." *Id.*

The proceedings below produced neither "duplication" nor "overlapping." The SEC applied PUHCA to prevent an abusive change in holding company structure; the creation of SOCCO. The FERC applied the FPA to make a utility—OPCO—operate efficiently by purchasing the cheapest coal on the market. The result conformed to Congress' plan precisely.

D. By Disregarding Congress' Language, the Court of Appeals Weakened the Very Regulatory Tools Congress Meant to Strengthen

The lower court's reading of Section 318 treats OPCO and SOCCO as one "person;" PUHCA treats them as separate companies engaging in an interaffiliate transaction subject to Section 13. This inconsistency invites utilities to use corporate form as a buffer against regula-

tory review. If the SEC's rules are inhospitable, OPCO can escape to FERC by producing the coal itself, thereby eliminating the interaffiliate transactions which trigger PUHCA review. And if FERC is inhospitable, OPCO can return to SEC review by resuming its interaffiliate relationship with SOCCO.

Absent Section 318—as the lower court interpreted it—such gamesmanship would be impossible. But Congress did not enact Section 318, or any other provision in PUHCA, to make regulatory result depend on corporate form. On the contrary:

> [I]t is the substance of what [holding companies] do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided to Congress could not be maintained if it were deemed to depend on the mere modal arrangements of those seeking to escape its exercise.

Electric Bond & Share Co. v. SEC, 303 U.S. 419, 440 (1938) (interpreting Congressional intent in enacting PUHCA).

Before the Court of Appeals decision, FERC was bound to subject interaffiliate transactions to special scrutiny. *See, e.g., Public Service Co. of New Mexico, supra*; *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342, 1348 (4th Cir. 1984). After the Court of Appeals decision, multistate holding companies—precisely those entities whose complex corporate structure and large geographic scope demand special scrutiny—can escape that scrutiny. By enabling these companies to buy goods and services free of competitive pressures, the decision below violates express Congressional intent: the intent to

> eliminate all hidden profits and unfair advantages resulting from the common interests of both parties to the transaction, [and] "to replace them with the checks and balances of free and open competition. . . ."

79 Cong. Rec. 8403, 8438 (1935) (Sen. Wheeler).[8]

The purpose of PUHCA was to restore "effective Federal and State regulation," S. Rep. No. 621, 74th Cong., 1st Sess. at 11 (1935), and to "whittle down the size and power and complication of these giant corporations until the Federal and State commission can be a match for them." 79 Cong. Rec. 9043 (1935) (Sen. Wheeler). FERC's application of the Federal Power Act here—an application which guaranteed "effective Federal . . . regulation," in no way interferes with PUHCA's goal; it complets the task which PUHCA began. *Cf. Baltimore Gas & Electric Co. v. Heintz*, 760 F.2d 1408, 1415 (4th Cir. 1985) (upholding against preemption challenge a state statute prohibiting certain corporate structures permitted by PUHCA), *cert. denied*, 474 U.S. 847 (1985).

The consumer protection authority granted the SEC in Section 13 is incomplete. *See Ohio Power, supra*, 880 F.2d at 1408 ("We note that section 13(b) and the SEC's regulations thereunder do not appear to require submission of and approval of interassociate agreements but only conformity of the same with the SEC-promulgated rules.") But the incompleteness of SEC's authority does not limit FERC's authority. In an analogous context, the

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[8] *See also Report of the National Power Policy Committee*, H.Doc. 137, 74th Cong., 1st Sess. 5 (1935) ("[Holding companies] make profits on the sale of materials to their subsidiaries. . . . These profits and fees, when dictated by the holding company sitting on both sides of the transaction, in no wise represent bargains freely and openly arrived at by subsidiary companies on the basis of the lowest cost in a competitive market."); 79 Cong. Rec. 10652 (1935) (Rep. Sauthoff) ("It was a very common practice not to have any competitive bidding in making purchases of supplies, equipment, or material of any kind. By not having competitive bidding it was possible to charge the operating company an excessive price and pocket the difference.").

Fourth Circuit ruled that Congress' failure to ban certain holding company structures does not preclude states from doing so. *See Baltimore Gas & Electric Co., supra*, 760 F.2d at 1414-15. Similarly, Congress' decision to authorize the SEC to regulate only the nonutility seller does not mean FERC cannot regulate the utility buyer.

II. THERE ARE NO "TRAPPED COSTS" BECAUSE THE SEC NEVER DIRECTED OPCO TO PURCHASE COAL FROM SOCCO

Properly read, Section 318 provides a solution to this case which is simple, logical and consistent with Congress' dual regulatory scheme. Once this Court finds that OPCO and SOCCO are not the same "person," it need go no further.

The Court of Appeals did go further, because it ignored Congress' clear language. The lower court explained that its "subject matter" holding was "informed" and "buttressed" by the "trapped costs" analysis of *Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). 880 F.2d at 1409-10. As we explain below, the "trapped cost" findings in *Nantahala* and *Mississippi Power & Light* have no application to the instant case.

A. In Nantahala and Mississippi, the Agency Directed the Buyer to Purchase From Its Affiliate; The Buyer Had No Legal Right to Buy From Other Sources

In *Nantahala* and *Mississippi*, the "trapping" took place because one agency (FERC) ordered a utility to take a certain action; then another agency (a state commission) set the utility's rates as if the utility had taken an entirely different action. The *Nantahala* Court explained this point clearly:

> Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation. *No source of power besides entitlement and purchased power from TVA is said to be available to Nantahala.*

476 U.S. at 973 (emphasis added). And the *Mississippi* Court further explained (487 U.S. at ——, 101 L.Ed.2d 322 at 339) (emphasis added):

> *Nantahala* involved a FERC order fixing the utility's right to acquire low cost power; this case [*i.e.*, *Mississippi*] involves a FERC order fixing MP&L's obligation to acquire high cost power. . . . [I]n this case FERC has determined that MP&L's cost of power obtained from Grand Gulf should be based on a particular allocation, and no other. In *Nantahala* the state court attempted to approve retail rates based on the assumption that Nantahala was entitled to more low cost power than FERC had allocated to it. Here the state court seeks to permit the State to set rates based on an assumption that *MP&L is obligated to purchase* less Grand Gulf power than FERC has ordered it to purchase.

Put another way, in *Nantahala* and *Mississippi Power & Light*, the buying utility had no legal mind of its own; yet the state commissions treated the utility as having the ability to shop for alternative power:

> [I]t obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that *FERC has ordered it to pay for*. Just as Nantahala had no legal right to obtain any more low cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

487 U.S. at ——, 101 L.Ed.2d at 339-40 (emphasis added).

B. OPCO Volunteered to Buy From SOCCO; and the SEC Did Not and Could Not Direct the Purchase

The facts here are fundamentally different from those in *Nantahala* and *Mississippi*. No agency obligated OPCO to buy from SOCCO. In *Nantahala* and *Mississippi*, the first step toward cost-trapping occurred when an agency ordered the utility to buy from its affiliate. Here the buyer initiated the plan. OPCO sought SEC permission in 1971 to acquire additional SOCCO stock to finance a coal mining venture in Ohio. *The entire OPCO-SOCCO scheme was voluntary.* The "trapped cost" argument does not apply, for the simple reason that there is no "trap."

Moreover, the approval OPCO sought was not for OPCO to buy coal from SOCCO; the approval was for SOCCO to sell coal to AEP's utility subsidiaries. The SEC noted that SOCCO would sell "at cost." But the SEC did not order SOCCO to sell at that price (or at any price); nor did the SEC order OPCO to buy at that price (or at any price). There is no SEC order even approving an OPCO purchase, much less ordering an OPCO purchase. Respondent's description of OPCO's coal costs as "costs which [OPCO] is obligated to pay pursuant to the SEC's order," Juris. Br. at 2, is false.

Even if the SEC had ordered OPCO's purchase, that order would not negate OPCO's voluntarism. In *Mississippi Power & Light*, *supra*, the holding company, through an agreement enforced by FERC (after modification), compelled the operating utilities to participate in the systemwide plan. *See* 487 U.S. at ——, 101 L.Ed.2d at 341 ("'[i]mplementation of the System plan . . . require[d] that the individual companies' needs be subsumed by the greater interests of the entire System'") (*quoting* underlying FERC decision). In the instant case, there is no sign of holding company participation. AEP was not even a moving party in any of the four SEC proceedings at issue here.

The SEC did not order OPCO's purchase for another reason: the SEC has no authority to do so. No provision of Section 13 or any other section of PUHCA applies to a utility *buying* goods from an affiliate or associate. Section 13(a) applies to "any registered holding company." Section 13(b) applies to "any subsidiary company of any registered holding company [which] . . . undertakes to . . . *sell* goods to . . . any associate company." Section 13(d) deals with "mutual service companies." Section 13(e) applies to "any affiliate of any public-utility company [which] . . . undertakes to . . . *sell* goods to . . . any such company of which it is an affiliate." Section 13(f) applies to "any person whose principal business is the *performance of* service, sales or construction contracts for public-utility or holding companies." These provisions have nothing to do with ordering a purchase.[9] Ordering a purchase would be regulating operations, a matter Congress entrusted to FERC. *See City of Lafayette*, *supra*.

The SEC approved a corporate relationship and nothing more. That approval *permitted* SOCCO to sell coal to the AEP subsidiaries (such permission being required by Section 13(b)). There was no "trap" created by inconsistent regulatory decisions. OPCO's decision to buy SOCCO's coal was OPCO's decision alone.

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[9] Section 13(c) is a general provision describing the types of regulations and orders the SEC may prescribe "under this Section" (*i.e.*, Section 13). Since no other provision of "this Section" authorizes the SEC to order OPCO's purchase, Section 13(c) cannot do so. Section 13(g) requires the SEC to conduct general industry investigations and report to Congress. Neither Section 13(c) nor Section 13(g) imposes any obligation on OPCO.

CONCLUSION

The Court of Appeals decision should be reversed.

Respectfully submitted,

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